INDEX.

CASES CITED.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 115.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ONE FORD COUPE AUTOMOBILE, No. 4776501, Alabama License No. 10978, Garth Motor Company,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 173.

PORT GARDNER INVESTMENT COMPANY

v.

THE UNITED STATES OF AMERICA.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Re-Argument on Direction of the Court.

Argued in October Term, 1925 as Cases Nos. 473 and 611.

SUPPLEMENTAL BRIEF FOR

GARTH MOTOR COMPANY, CLAIMANT, IN CASE NO. 115;

PORT GARDNER INVESTMENT COMPANY, IN CASE NO. 173.

Opinions Below.

In Case No. 115, The United States of America *v.* One Ford Coupe (Garth Motor Company, Claimant), the opin-

ion of the Circuit Court of Appeals for the Fifth Circuit (R. 14-16) is reported in 4 Fed. (2) 528.

In Case No. 173, *Port Gardner Investment Company* v. *The United States,* the decision was by the District Court for the Western District of Washington, and has not been reported. The case was certified to this court by the Circuit Court of Appeals for the Ninth Circuit.

Statement.

These cases were argued on December 9, 1925 as cases Nos. 473 and 611 of the October Term of 1925. Preceding that argument a brief was filed by the government in case No. 473, now known as No. 115, *The United States of America* v. *One Ford Coupe Automobile,* and the brief filed by us, besides advancing original arguments of our own, replied to the government brief in the *Ford Coupe case.* Immediately preceding the oral argument, the government filed another brief in case known then as No. 611, now No. 173, *Port Gardner Investment Company* v. *The United States of America,* to which we replied only at the oral argument and not by written brief, and to which summary reply will be made in this brief. It will serve no useful purpose to reiterate at length all that was said by us in our original brief, because that brief is still before the court. For the convenience of the court, however, we will re-copy a summary of the argument in that brief, and we herewith enumerate some of the important cases decided since that brief was filed.

Danciger v. *Crooks,* (D. C. Mo. W. D.) 13 Fed. (2) 642, holds that the taxes although reenacted by the Willis-Campbell Act (42 Statutes 222) nevertheless remain penalties.

Coffey v. *Noel,* (D. C. Va. W. D.) 11 Fed. (2) 399, also holds that the taxes being punitive were in fact penalties.

United States v. *One Chevrolet* (D. C. Mo. E. D.), 9 Fed. (2) 85 holds that Section 26 of the National Prohibition Act, and Section 3450 of the Revised Statutes were in direct conflict, and that the Willis-Campbell Act did not change the nature of the money exactions, constituting them penalties instead of taxes by its reenactment clause.

Marmon Atlanta Company v. *United States,* (C. C. A. 5) 8 Fed. (2) 267, reverses the decision of Judge Sibley in 5 Fed. (2) 113, and continues to follow the previous holding in *United States* v. *One Ford Coupe* (Garth Motor Company case), No. 115 at bar.

United States v. *Deutsch,* (D. C. N. J.) 8 Fed. (2) 54, holds that Section 26 of the National Prohibition Act was the only acceptable statute.

Some cases cited in our original brief were not reported at the time, but now may be found reported as follows:—

National Bond and Investment Company v. *United States,* (C. C. A. 7) 8 Fed. (2) 942.

United States v. *One Reo Truck,* (C. C. A. 2) 9 Fed. (2) 529.

The arguments advanced by us in the original brief were as follows:—

Summary of the Original Argument.

1. Section 3450 Revised Statutes, as applied to the facts in both instant cases, was repealed by the adoption of the National Prohibition Act, 41 Stat. 305 (*United States* v.

Yuginovich, 256 U. S. 450, *Lewis* v. *United States*, (C. C. A. 6), 280 Fed. 5 and was not re-enacted by Section 5 of the Supplemental Act of November 23, 1921, 42 Stat. 222, (sometimes referred to as the Willis Campbell Act), because Section 3450 is in direct conflict with the National Prohibition Act, and especially Section 26 thereof, as applied to the facts in the cases at bar. *United States* v. *Stafoff*, 260 U. S. 477, does not hold the contrary, because the questions now presented were not present in that case. (*Commercial Credit Company* v. *United States*, (C. C. A. 6) 5 Fed. (2d) 1.)

There is a direct conflict because under Section 3450 the automobile is given a personality and made accountable for its own wrongs, and the rights of innocent parties in the automobile are forfeited, while under Section 26 of the National Prohibition Act the automobile is not given a personality and is not in itself made accountable for the wrong, and the rights of innocent parties are protected.

There also is a direct conflict between the old revenue per gallon system of taxation under the Revised Statutes, in support of which Section 3450 was enacted, and the provisions of Section 35 of the National Prohibition Act, 41 Stat. 317, abolishing and forbidding as to illicit liquor all advance payments of taxes through stamps and receipts.

2. Even though Section 3450 were re-enacted, it would not be applicable to the automobiles in the cases at bar, because the users of the automobiles were not distillers and therefore were not defrauding or intending to defraud the Government of a tax since the taxes under Revised Statutes were *in personam* against the distiller and not *in rem* against the liquor. Furthermore the liquor was not re-

moved, deposited or concealed within the meaning of Section 3450, but was transported and possessed within the meaning of Section 26 of the National Prohibition Act, 41 Stat. 315. *Goldsmith-Grant Company* v. *United States*, 254 U. S. 505, does not hold to the contrary because in that case a violation of Section 3450 was conceded and the only question was the effect on property rights of innocent parties.

3. Congress intended and made it mandatory that the provisions of the National Prohibition Act should be applied to the offenses in the instant cases. The Government cannot proceed against the offending person under the National Prohibition Act and against the offending automobile under Section 3450 for the same act. A conviction of the person *ipso facto* causes a forfeiture of the rights of the convicted law violator in the automobile. Innocent lienors are protected whether or not the person has been convicted.

United States v. *One Reo Truck*, (C. C. A. 2) 9 Fed. (2) 529;
United States v. *Torres* (Md.), 291 Fed. 138;
United States v. *One Ford Coupe*, (C. C. A. 5) 4 Fed. (2d) 528 (Case No. 115 at bar).

4. Since the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Act, there is no tax upon illicitly made liquor or moonshine whiskey. There being no tax, there could be no intent to defraud of a tax, and Section 3450 is not applicable. (Commercial Credit Company *v.* United States, 5 Fed. (2d) 1.)

5. The former taxes, if any survive, became in fact penalties by the adoption of national prohibition. (*Fontenot* v. *Accardo,* (C. C. A. 5) 278 Fed. 871.) This court has never hesitated to strip a penalty of its disguise as a tax and will not hesitate to do so when otherwise the effect will be to deny citizens the constitutional guaranties afforded by the Fifth Amendment to the Constitution. (Lipke *v.* Lederer, 259 U. S. 557.)

6. The Government's brief in Case No. 473, now No. 115, Garth Motor Company, Claimant, clearly shows an attempt to wrest an old statute (Section 3450 Revised Statutes) out of its plain context to fit a new delinquency for which the old statute was never designed and for which a new statute (National Prohibition Act) was designed. This is being done in utter disregard of the rights of innocent parties and of the mandate of the new statute, and to the embarrassment of the automobile industry, the largest industry in the country. The only excuse offered by the Government is some inconveniences and annoyances caused to it by the procedure required under the new act. For a cure for such defects the Government should address its plea to the legislative and not to the judicial branch of government.

Summary of the New Arguments.

We believe that the particular point in the original argument, which has given the court some concern, necessitating a re-argument, is that mentioned in Argument No. 5, page 41 of our brief. There we said the taxes on beverage liquors were in fact penalties, and could not be arbitrarily

enforced against acknowledged innocent parties without violating the Fifth Amendment. Believing that it will assist the court to go more fully into that argument, we have enlarged upon it in this brief. We have also in this brief answered the argument advanced by the government in the brief filed in the *Port Gardner Investment Company case,* to which we had no opportunity to reply at the original argument and we have added a few additional authorities to Arguments 1 and 2 of our original brief. For the convenience of the court we summarize these arguments as follows:—

1. The nature and character of the revenue laws, particularly Section 3450 Revised Statutes, insofar as they relate to beverage liquors, were changed upon the adoption of National Prohibition Act, so that the laws originally intended to protect revenue (taxes) by the change became laws in aid of prohibition (penalties).

See

Fontenot v. *Accardo,* 278 Federal 871;
Regal Drug Company v. *Wardell,* 260 U. S. 386.

2. Congress intended the revenue laws as penalties only upon a prohibited business and not upon a lawful ownership of innocent conditional vendors and mortgagees of automobiles. This is evidenced by the use of the words "diverted" and "diversion" in Section 600-a, (42 Statutes 227, 285) and by the machinery set up in the National Prohibition Act for its own enforcement. Congress did not intend to confiscate the property of innocent parties as is shown by Section 26 of the National Prohibition Act.

3. The dictum in *United States* v. *Yuginovich,* 256 U. S. 450, that Congress may under the broad authority of the taxing power tax that which is prohibited is not supported by the authorities cited therein. *License Tax Cases, 5 Wallace* (72 U. S.) 462; *In re Kollock,* 165 U. S. 526; *United States* v. *Jin Fuey Moy,* 241 U. S. 394; *United States* v. *Doremus,* 249 U. S. 86, as analyzed, show them to be in support of revenue measures and not penal statutes.

4. The revenue feature has always been the controlling influence to determine whether a statute is a tax measure, and according to eminent authority should be the only influence in determining if there is a tax in fact.

D. A. Wells—*Theory and Practice of Taxation;*
Cooley on *Constitutional Limitations;*
John Randolph Tucker—*Constitution of the United States;*
Story—*Commentaries on the Constitution.*

5. The framers of the Constitution intended that the taxing power should be used for purposes of revenue only.

Jefferson's Correspondence, Vol. 4;
The Federalist.

6. The power to make money exactions as regulatory measures, such as in *Veazie Bank* v. *Fenno,* 8 Wallace (77 U. S.) 533, is to be found in the implied authority of the specific general powers given to Congress, and not in the taxing power.

Head Money Cases, 112 U. S. 580;
Cooley on Taxation;

Taxation for the Purpose of Destruction, by J. B. Waite, 6 Michigan Law Review 277;

The National Police Power under the Taxing Clause of the Constitution, by R. E. Cushman, 4 Minn. Law Review 247;

Indirect Encroachment on the Federal Authority by the Taxing Powers of the States, by Thomas R. Powell, 31 Harvard Law Review 321;

Is There a National Police Power, by Paul Fuller, 4 Columbia Law Review 563;

Covert Legislation and the Constitution, by Judge Charles M. Hough, 30 Harvard Law Review 801.

7. Where private property is taken solely as a punishment, it is under the penal power as distinguished from the taxing power of the government.

See

Seligman—*Essays in Taxation;*

The King v. *Barger* (Australian Case), 6 Commonwealth L. R. 41;

Child Labor Tax Case, 259 U. S. 20;

Trusler v. *Crooks,* 70 Law Ed. 198;

and as a penalty if enforced against innocent parties without due process of law, it is a violation of the Fifth Amendment.

Regal Drug Co. v. *Wardell,* 260 U. S. 386;

Lipke v. *Lederer,* 259 U. S. 557.

8. The arguments advanced by the government in its brief at the original argument in Case No. 173, *Port Gardner Investment Company* v. *United States,* that the tax of which the government is being defrauded is a so-called basic tax for non-beverage liquor, is unsound in view of the fact that the driver of the car was arrested and convicted for transporting beverage liquor, and the liquor cannot be considered as beverage liquor for the purposes of convicting the driver and as non-beverage liquor in order to forfeit the car. The authorities cited by the government in that brief have been either criticized or reversed.

I.

The Alleged Taxes Are in Fact Penalties.

Penalties Disguised as Taxes on Beverage Liquors Cannot Summarily and Arbitrarily Be Enforced Against Acknowledged Innocent Parties Without Violating the Fifth Amendment.

In view of the sixth certified question from the Circuit Court of Appeals for the Ninth Circuit in Case No. 173, *Port Gardner Investment Co.* v. *United States,* and in view of the fact that in Case No. 115, *United States* v. *One Ford Coupe, Garth Motor Company, Claimant,* the automobile was seized but the driver of the automobile, Killian, was not arrested, we have then for further consideration the question whether the so-called taxes under Section 600-a as amended by the Act of November 23, 1921 (Chap. 136, 42 Stat. 227, 285), are in fact penalties. We pointed out in our original brief, under Argument No. 4, at page 40,

that there was no tax under Section 600-a prior to the amendment of November 23, 1921, because liquor could not be withdrawn, as that term was meant in the section, for beverage purposes in view of the adoption of national prohibition; and that therefore the words "diverted" and "diversion" in the amendment to Section 600-a of the Act of November 23, 1921, were of particular significance; that these words showed plainly that Congress intended to penalize the persons responsible for the diversion of the liquor; that the tax for legal withdrawal was no more but that a penalty for illegal diversion had taken its place.

Admittedly the tax statutes on intoxicating liquor before the adoption of national prohibition were for revenue purposes, and were in theory and in fact taxes. As such they were properly enforced in *Goldsmith-Grant* v. *United States,* 254 U. S. 505. That case as shown in our original brief at the first argument is not controlling here. (see original brief, p. 21). Upon the adoption of national prohibition, however, and upon the re-enactment of the prior statutes by the Supplemental Act of 1921 (if it should be considered that under *United States* v. *Stafoff,* 260 U. S. 477, they were re-enacted, *contra,* see Argument 1, page 12 of our original brief), those statutes thereupon became penal statutes in aid of prohibition, instead of tax statutes for revenue purposes. The Circuit Court of Appeals for the Fifth Circuit, in *Fontenot* v. *Accardo,* 278 Fed. 871, which has been cited by this court with approval in *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, states clearly the change in the nature and character of the statutes, as follows:

> "The act of Congress, passed to enforce the Eighteenth Amendment, is a highly penal statute.

> It is not a revenue measure. Whatever charges still remain upon prohibited beverage liquors are imposed for the purpose of preventing the manufacture and sale thereof. Many provisions of the old laws which had proved useful in protecting revenue can be used effectively in preventing violations of the prohibitory act, and hence we find that section 35 repeals the revenue laws only in so far as they are inconsistent with the provisions of the act; *but the purpose of the old provisions changed upon their adoption by the new act, so that the laws originally intended to protect revenue by the change became laws in aid of prohibition.*" (Italics ours.)
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> *United States* v. *2,000 Cases of Whiskey* (C. C. A. 2), 277 Fed. 410;
> *United States* v. *American Brewing Co.* (Pa.), 296 Fed. 772.

The theory of the Fifth Circuit that the taxes were in fact penalties was again reemphasized by this court in *Regal Drug Co.* v. *Wardell,* 260 U. S. 386. In that case among other taxes the tax now under consideration in the cases before this court had been levied against the Regal Drug Company, i. e., the tax at $6.40 per gallon, amounting in the aggregate to $115,092.50, which was the largest tax involved in that case. That tax was levied without notice or hearing to the Regal Drug Company. It was urged upon this court at that time, as it has been urged by the government in these cases, that the prior decision of this court in *Lipke* v. *Lederer,* 259 U. S. 557 was not controlling in that Mr. Justice McReynolds in that case had under consideration not a tax imposed by the revenue laws but a double penalty or tax, or a special penalty specifically imposed by Section 35 of the National Prohibition Act. This

court, however, in the Regal Drug Company case, speaking through Mr. Justice McKenna, in referring to the decision in *Lipke* v. *Lederer,* and to the consideration of the so-called tax of $6.40, said——

> "The distinction between a tax and a penalty was emphasized. The function of a tax, it was said 'is to provide for the support of the government', the function of a penalty clearly involves the 'idea of punishment for infraction of the law', and that a condition of its imposition is notice and hearing. * * * And even if the imposition may be considered a tax, if it have punitive purpose, it must be preceded by opportunity to contest its validity. Central of Ga. Ry. v. Wright, 207 U. S. 127.
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> "We took pains to say that 'evidence of crime (paragraph 29) is essential to assessment under paragraph 35', and that we could not 'conclude in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See Fontenot v. Accardo, 278 Fed. 871. A preliminary injunction should have been granted.'
>
> "The comment and decision are applicable here, and decisive. The Government concedes that the case is conclusive against the 'penalties and double taxes,' but contends that under tax laws which antedated the National Prohibition Act, only inconsistent laws are repealed, and that taxes in this case were levied under a law not inconsistent. For this paragraph 35 is adduced. Lipke v. Lederer (259 U. S. 557) manifestly precludes the contention."

The holding of this court in the *Regal Drug Company case* we submit is absolutely controlling in the cases now under consideration. If the so-called tax of $6.40 was a penalty on December 11, 1922 when the *Regal Drug Company case* was decided, it remains a penalty today because nothing has happened in the meantime to change its character or its purpose.

In *Jasper* v. *Hellmich*, 4 Fed. (2) 852, at page 854, Judge Faris said——

> "If the impositions provided for by section 35, *supra, were penalties before the passage of the Willis-Campbell Act,* and upon this point there is left by the ruled cases neither doubt nor question, what is there in the latter act to change their meaning or color? The latter act does nothing as to this; its sole office is to change, or attempt to change, the manner of their collection. They are called in this act simply 'taxes and penalties provided for in section 35 * * * of the National Prohibition Act'. No sufficient effort is made by the Willis-Campbell Act to alter or change the inherent nature of these impositions, although, as stated in the Yuginovich Case, Congress had the power to do this. If, then, Congress merely provided penalties by Section 35 as contradistinguished from taxes, obviously, and as a mere casual reading discloses, *the language of the Willis-Campbell Act,* above quoted, *cannot,* without violence, be fairly construed to *have the effect to change these penalties into taxes.*" (Italics ours.)

See also—

> *United States* v. *One Chevrolet,* 9 Fed. (2) 85; *Coffey* v. *Noel,* 11 Fed. (2) 399.

Apparently the government, in again urging upon this court the same arguments advanced by it in the *Regal Drug Company case,* hopes that this court might upon a reconsideration of the question, consider the tax of $6.40 on beverage liquor a tax in fact and not a penalty, because of the expression of this court in the case of *United States* v. *Yuginovich,* 256 U. S. 450, at page 462, in an opinion by Mr. Justice Day, in which he said,

> "• • • That Congress may, under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment."

citing as authority for this statement—

> *License Tax Cases,* 5 Wallace (72 U. S.), 462, 471;
> *In re Kollock,* 165 U. S. 526, 536;
> *United States* v. *Jin Fuey Moy,* 241 U. S. 394;
> *United States* v. *Doremus,* 249 U. S. 86.

The above cited expression of this court in the Yuginovitch case is dictum because it was not absolutely necessary to determine the nature of the tax in that case in order to reach the conclusion that the prior statutes were impliedly repealed upon the adoption of national prohibition. In view of the controlling decision of this court in the *Regal Drug Company case,* that the so-called taxes are in fact penalties, it might be advisable to reconsider the above cited statement from the *Yuginovich case* as to the exercise of the taxing powers of Congress.

If a law merely imposes a tax without disclosing the indirect purpose of its imposition, it is true that the courts may have no right to declare the law unconstitutional or to examine into the motives or purpose of the legislature in adopting the tax measure.

See—

McCray v. *United States,* 195 U. S. 27;
John Randolph Tucker, *Constitution of the United States,* Vol. I, Section 218, page 465.

Where, however, the purpose is disclosed on the face of the act itself to be other than that of a tax, this court will not allow a money exaction to be made under the broad taxing powers of Congress.

See—

Child Labor Tax Case, 259 U. S. 20.

Plainly on its face Section 35 of the National Prohibition Act as amended by the Supplemental Act of 1921, and Section 600-a of the Revenue Act as amended by the Act of November 23, 1921, did not impose the tax of $6.40 as a revenue measure. That tax is exacted from the person responsible for the "diversion" of the liquor from beverage to non-beverage purposes. It is an infraction of the law to so "divert" liquor. The tax is a punishment for that infraction. The law provides no procedure for the payment of the money exaction as a tax.

Commercial Credit Co. v. *U. S.,* 5 Fed. (2) 1.

Any attempt to pay such a tax would be *prima facie* evidence of a crime. It would not be offered by the party

guilty of the "diversion" nor accepted by the government as a tax, as that term is generally understood either in the science of economics or of law.

May a money exaction be made under the broad taxing powers of Congress as a punishment for the doing of a prohibited act? If the statement of Mr. Justice Day in the *Yuginovich case* can be taken as an affirmative answer to such a question, at least the authorities cited do not support such a proposition of law. In all of the tax acts considered in those cases, the premise was either assumed or established that the statute was in fact a revenue measure.

In the *License Tax Cases,* 5 Wallace (72 U. S.) 462, the tax was not in respect to a business prohibited by Congress but was in respect to a business prohibited by certain of the states. It was a tax which on its face the Internal Revenue Act of 1864 imposed upon persons engaging in certain trades or businesses, including those of selling lottery tickets, and retail dealing in liquor. These persons were required to obtain a license. By the amendatory act of 1866 the words "special tax" were substituted in the place of the word "license". The court dismissed the argument that the granting of a license gave authority in itself to carry on the business. The business in respect to which the tax was considered was that of a lottery business in New York and New Jersey, in which states the selling of lottery tickets was prohibited, and a liquor business in Massachusetts in which state the retail sale of liquors was prohibited. The court states the question as follows:

> "The general question in these cases was: Can the defendants be legally convicted upon the several indictments found against them for not having complied with the acts of Congress by taking out and

> paying for the required licenses to carry on the business in which they were engaged, such business being wholly prohibited by the laws of the several States in which it was carried on?"

The granting of a license was considered as nothing more than a mere form of imposing a tax and to imply nothing *except that the licensee should be subject to no penalties under the national law if he paid the tax,* Chief Justice Chase said—

> "They (licenses) simply express the purpose of the government not to interfere by penal proceedings with a trade nominally licensed, if the required taxes are paid."

The licenses were treated as mere receipts for taxes. The statute was considered as a revenue measure of the national government and was not hostile or contrary to the state enactments. Congress did not exempt or protect the licensee from punishment by the state, but the payment of the tax did exempt the licensee from punishment by the national government. The national and state statutes were therefore not hostile or contrary.

There was no national mandate, like our Eighteenth Amendment, against the lottery business. The case therefore cannot be accepted as authority for the proposition that Congress may tax a business which the Constitution prohibits.

Conversely the case might be considered as authority that Congress may not tax that which the Constitution prohibits, because Chief Justice Chase emphasizes in his opinion that the payment of the tax exempted the licensee from penal proceedings by the national government for the carry-

ing on of the business. If the payment of a liquor tax should now be considered as exempting the tax payer from punishment for violating the constitutional provisions, Congress would then be able to frustrate the national mandate by the passing of a tax statute.

In re Kollock, 165 U. S. 526, involved the question of a tax on oleomargarine. The regulatory features of the statute were considered as incidental to the tax. The sale of oleomargarine was not prohibited as is the sale of beverage liquor. Oleomargarine was regulated only for the purpose of securing revenue. Chief Justice Fuller in the course of his opinion said:

> "The act before us is on its face an act for levying a tax, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, *its primary object must be assumed to be the raising of revenue.*" (Italics ours.)

In United States v. *Jin Fuey Moy,* 241 U. S. 394, the Narcotic Act was treated primarily as a revenue measure. Mr. Justice Holmes said:

> "Congress, at all events, contemplated production (of opium) in the United States and therefore the act must be construed on the hypothesis that it takes place. * * * "
>
> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court, in treating those ends as to be reached only through the revenue measure and within the limits of the revenue measure, was right."

If the Narcotic Act instead of showing on its face that it was a revenue producing measure had primarily shown that it was enacted to prohibit or to punish, there is nothing in the decision to warrant the conclusion that it would then have been brought within the taxing power The moral end of that statute is treated as incidental to the revenue producing end.

The remaining case cited in the Yuginovich case, *United States* v. *Doremus*, 249 U. S. 86, also arose out of the violation of the Narcotic Act. It held, following the decision of the *License Tax Cases*, that the reserved police power of the state was not invaded because of the regulatory features of the statute. They were incidental means to aid in collecting the tax. They kept the traffic above-board and subject to inspection "by those authorized to collect the revenue", thereby diminishing the opportunity for unauthorized persons to sell drugs clandestinely without payment of the tax. The decision was by a divided court. The case is not authority for the proposition that Congress may under the taxing power make money exactions in respect to acts which it prohibits. The court said:

> "Considering the full power of Congress over excise taxation the decisive question here is: *Have the provisions in question any relation to the raising of revenue?*" (Italics ours.)

There seems to be some question in the minds of this court as to whether it decided properly that in the Doremus case the question had relation to the raising of revenue, and therefore that it did come within the taxing power.

In the case of *United States of America* v. *Daugherty,* 70 Law Ed. 169, at page 171, Mr. Justice McReynolds says—

> "The constitutionality of the Antinarcotic Act, touching which this court so sharply divided in United States *v.* Doremus, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in Hammer *v.* Dagenhart, 247 U. S. 251; Child Labor Tax Case (Bailey *v.* Drexel Furniture Company) 259 U. S. 20; Hill *v.* Wallace, 259 U. S. 44; and Linder *v.* United States, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

At the time of the facts in the case of *Goldsmith-Grant Company* v. *United States,* 254 U. S. 505, there was an excise tax on beverage liquor, and it was stipulated in that case that the automobile was used in violation of the statutes. The Goldsmith-Grant decision, therefore, does not have any direct bearing on the facts in the cases now before this court. (See page 21, Argument 2, of the original brief.)

The revenue feature in the statutes in the cases considered by this court has always been the controlling influence, and according to eminent authority should be the only controlling influence in determining that there is a tax in fact. D. A. Wells, in his "*Theory and Practice of Taxation*" says, in Chapter 11, page 251—

> "In short, the proposition would seem to be clear that the state cannot, without violating the simple principles of justice which prescribes equality in taxation, use its taxing power for effecting any other purpose whatever except to raise money";

and on page 254 he says further, in discussing the limitations upon the taxing power and the generic differences between tax and police powers of the government—

> " * * * The object of the taxing power is to raise money to defray the expenditures of the state, and proof and argument seem conclusive that it cannot be legitimately used for anything else. * * * The idea, therefore, of resorting to taxation for the purpose of protecting individuals against their own foolishness, enforcing morality, preventing social ills or as an instrumentality for the punishment of crime, is to pervert an agency from the one sole purpose for which it can rightfully exist to another less fit and not warranted by necessity, and presupposes an entire misconception of the principles of a free government; and all perversions of this power are certain to entail evils greater than the abuses which it is devised to remedy. * * * The manufacture and sale of spirituous liquors, in common with all other branches of business, is a legitimate subject for taxation, but *there is a broad distinction—indeed nothing in common—between taxing this business for revenue and in levying taxes with a view to preventing the business* from being transacted at all, and so preventing revenue.
>
> "Again, if the above analysis of the origin, justification and limitation of the power of taxation is correct, it would seem evident that to seek to make the occasion for the exercise of the power other than necessity, and the object anything else than the raising of money for meeting the expenditures of a government economically administered, is to strike a blow at not only good government but also at free government. (Italics ours.)

Judge Cooley in *"Constitutional Limitations"*, 6th ed., at page 598 says—

> "In the first place, taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of money from the citizens for other purposes is not the proper exercise of this power * * *. And unlimited power to make anything and everything lawful which the legislature might see fit to call taxation would be when plainly stated an unlimited power to plunder the citizens."

and also in his *"Constitutional Law," Chapter 4, page 56,* Judge Cooley says at page 57—

> "Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful."

John Randolph Tucker in *Vol. I, Section 215,* page 457 of his *"Constitution of the United States,"* says—

> "1st, It is a revenue power vested in Congress as a substitute for the eighth article of the Confederation, giving to the federal government an express power to raise its own revenue independent of state action; * * * The language imports a revenue power to lay and collect. These words are wedded and are not to be divorced. Taxes are not to be laid except to be collected, revenue is the object of the grant and none other."

and further, Section 218, page 465, he says—

> "Again, is it constitutional to use this taxing power for the purpose of suppressing a business in the country and not as a means of revenue, though

> some revenue may be derived from it? The answer seems to be clear, that a power granted as a means of raising revenue cannot be diverted from this legitimate purpose by the indirect use of it to do what Congress has no power to do by direct taxation. The end is not legitimate and therefore the law is not constitutional. It is true that where the law merely imposes a tax without disclosing the indirect purpose of its imposition, the courts may have no right to declare the law unconstitutional, though if the purpose were disclosed on the face of the act, the courts would do so."

Some text writers and some courts have loosely quoted Mr. Justice Story's "*Commentaries on the Constitution*" as authority for the proposition that the taxing power under the Constitution is not confined only to the purpose of raising revenue. These authors have erred in taking extracts out of the "Commentaries" without carefully studying the whole context. Mr. Justice Story was summarizing the conflicting views on the taxing power and was not making any expression of his own. He was careful in his introduction to this summary to say that it was merely a summary and not an expression of his own views. *In Section 958, page 708, Volume I, Story on the Constitution,* Fifth Edition, he says—

> "These 'Commentaries' require that the doctrine should be freely examined as maintained on either side, the result will be left to the learned reader, without the desire to influence his judgment or dogmatically to announce that belonging to the commentator."

Then follows a summary of the various views. See pages 708 to 715, inclusive, Sections 958 to 974. Section 961 states

the theory that a specific power cannot be used to accomplish another purpose, and thereby sacrifice the original object for which the specific power was granted. That would be a "violation of perversion the most dangerous of all, because the most insidious and difficult to resist." Vice-President Calhoun is supposed to have been one of the greatest exponents of this theory, and it is found incorporated in the exposition and protest of the Committee of House Representatives of South Carolina, on December 19, 1829, which is generally accepted to be the work of Calhoun. This view was later re-expressed to the effect that within the limits of revenue Congress could so arrange a tax as incidentally to accomplish another purpose but that it could not convert an incidental into a principal power and thus transcend the limits of revenue. Story summarizes all of the views on limitations of the taxing power in Section 963 at page 710 when he says—

> "The power to lay taxes is a power exclusively given to raise revenue, and it can constitutionally be applied to no other purpose. The application for other purpose is an abuse of the power; and, in fact, however it may be in form disguised, it is a premeditated usurpation of authority. Whenever money or revenue is wanted for constitutional purpose, the power to lay taxes may be applied to obtain it. When money or revenue is not so wanted, it is not a proper means for any constitutional end."

In the subsequent sections Justice Story assembles the contrary views, in which it is said that the commercial history of nations shows that the taxing power is often applied for other purposes than revenue; and that the taxing power under the Constitution was general and unlimited; and that

the power to pay debts, and provide for the national defense and general welfare were independent powers. Some writers think that Chancellor Kent (*Commentaries 14th ed., Vol. I, *268, p. 330*) approved the construction that the general welfare clause was independent and the most essential and the tax clause was with other clauses only an instrument to carry it into effect. This argument in other parts of his "Commentaries" Mr. Justice Story considers unsound in that he believes that the clause should be read granting the power to lay taxes "for the purpose of paying or in order to pay" debts, etc. Jefferson was the first to express this thought, later approved by Story, in his opinion on the power of Congress to establish the Bank of the United States. *See Jefferson's Correspondence, Randolph Edition, Vol. 4, pp. 524, 525.* It has been generally accepted by the courts, and the theory that the power to pay debts and to provide for the general welfare were independent powers has been authoritatively rejected.

The next view summarized is that the general welfare may be promoted by the laying of a tax other than for the purpose of raising revenue, and the wisdom or inexpediency of any such measure is no test of its constitutionality. This view has been generally attributed to Hamilton, and would seem to be disclosed in his *"Report on Manufactures", 1791. See Hamilton's Works, Lodge Ed., Vol. IV, p. 70, at p. 151.* However, when the opponents to the adoption of the Constitution advanced arguments against it on the ground that the general welfare clause in the taxing power would give the federal government unlimited power, Madison refuted these arguments. See *"The Federalist", original number XL, modern number XLI, Dawson's Edition of "The Federalist", page 285.*

The expressions of Madison at that time were understood to have the full approval of Hamilton, giving some basis for the subsequent charge that if the taxing power should be used as an unlimited means of promoting the general welfare, the framers of the Constitution must therefore have been guilty of either "premeditated folly or premeditated fraud." While "The Federalist" discusses the federal taxing power at length, there is no suggestion in it that the power was ever intended to be used for purposes other than revenue. (*See original numbers XXIX to XXXIV inclusive, modern numbers XXX to XXXVI, Dawson's Edition of The Federalist, pp. 186-230*).

The concluding view given in the Commentaries, was that the taxing power was restricted to the objects of the other enumerated powers that follow. Mr. Justice Story seemingly does criticize this view in setting it forth.

The various opinions as to the exercise of the taxing power and the limitations thereon are also reviewed in an excellent article entitled, "*The National Police Power under the Taxing Clause of the Constitution*", by Robert Eugene Cushman, in March 1920 Minnesota Law Review, *4 Minnesota Law Review 247.*

There is nothing recorded in the "*Debates of the Convention*" or in any of the writings of the framers of the Constitution at the time to show that any attempt was made in the Convention to specifically define the taxing power of the government. *See Farrand, Records of the Federal Convention, Vol. I.* It is known that Section 8 of the Articles of Confederation, which corresponds to the grant of the taxing power now in the Constitution, had made the federal government too dependent upon the states

for its revenue. This drove the framers of the Constitution to the necessity of a complete power of the national government itself to raise financial resources for the support of the government, independent of the states. It was necessary, however, for the power to be limited in such a way as to allay the fears of the people that the national government might become despotic and the state governments supine, and it was to this end that the limitations of uniformity and apportionment were inserted. With some of the other clauses, such as the right to regulate foreign trade and national currency, the people were not so much concerned at that time. The concluding clause of Section 8, Article I of the Constitution, generally called the co-efficient power, reenforces the other enumerated powers in that it provides that Congress might make all laws necessary and proper to carry the enumerated powers into effect.

Many of the controversies in which the text writers, historians and political leaders became engaged, as well as some eminent present day economists, could have been settled by giving proper consideration to the co-efficient power contained in the last paragraph of Section 8, or at least to an understanding of the implied power in the government to make money exactions in execution of the granted powers.

For instance, the conflicting views as to whether or not the imposition of tariff duties is a proper exercise of the taxing power could have been reconciled if the controversialists had recognized that the tariffs might be a proper exercise of the implied power under the power to regulate foreign commerce, or at least derived from the co-efficient power of the concluding paragraph of the article. (Com-

pare Seligman's *"Essays in Taxation"* with Wells' *"Theory and Practice of Taxation"*; Tucker's *"Constitution of the United States"* and Cooley's *"Constitutional Law"* with Story's *"Commentaries on the Constitution"* and Hare's *"American Constitutional Law"*; compare also Republican platform with statement in Democratic platform of 1892 and 1912, that "the Federal government under the Constitution has no right or power to impose or collect tariff duties except for the purpose of revenue".)

It seemed to be accepted, at least by some of the constitutional framers, that the power to regulate trade gave Congress the implied power to regulate it in any manner or by any means it thought wise. Madison in *"The Federalist", original number XLIII, modern number XLIV*, page 314, of Dawson's Edition, says—

> "Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

We submit that in adopting the Eighteenth Amendment to the Constitution there can be found in it sufficient power by implication for Congress to enact penalties or money exactions without having recourse to the taxing power. In *United States* v. *Gaffney* (C. C. A. 2) 10 Fed. (2) 694, at 696, Circuit Judge Hough said—

> "The Constitutional authority to enact sections 21-23 of title 2 of the National Prohibition Act may

> be assigned to the police power. It has been said, rather carelessly, that the United States has no police power; but the accurate way of putting it is that the United States possesses whatever police power is appropriate to the exercise of any attribute of sovereignty specifically granted it by the Constitution. * * *
>
> "Granting that, before the Eighteenth Amendment, the United States possessed no police power competent for the purpose of the decree below, when the amendment gave to the United States the powers thereby created, it gave also all the power necessary and appropriate to carry out the object of the amendment."

In this implied or in the co-efficient power would be found authority for the regulation by taxes or money levies or tariffs of many cases considered by this court and statutes enacted by Congress, rather than having recourse to the taxing power granted in the Constitution. Judge Cooley in his *"Taxation", 3rd ed., Vol. I, page 14,* says—

> "But a law, which under the name of taxation, has for its purpose only to embarrass and perhaps to destroy a certain branch of commerce * * * would seem more properly to derive its force from the authority * * * to regulate commerce * * * than to an authority conferred for revenue purposes."

It is upon this theory that John Barker Waite, in an article entitled *"Taxation for the Purpose of Destruction"* in the February 1908 Michigan Law Review, *6 Michigan Law Review 277,* develops his argument that the express power to lay taxes is not requisite to nor similar to an implied power to impose money exaction for the sole purpose of executing an express power to regulate. It is from this

angle that Mr. Waite interprets many of the cases decided by this court which have been erroneously cited by some text writers as authority for the exercise of the taxing power.

Although in the case of *Veazie Bank* v. *Fenno*, 8 Wall. (77 U. S.) 533 this court lays down the rule that the judicial cannot prescribe to the legislative department limitations upon the exercise of its taxing powers, nevertheless that case was decided not under the taxing power clause of the Constitution but under the power to provide for and protect the national currency.

Mr. Justice Miller in the *Head Money Cases*, 112 U. S. 580 at 596, said—

> "In the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549, the enormous tax * * * was upheld because it was a means properly adopted by Congress to protect the currency * * * It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

See also *National Bank* vs. *United States*, 101 U. S. 1.

Possibly Mr. Justice Holmes will not accept this interpretation and he may believe the *Veazie Bank case* was decided under the taxing powers. See dissenting opinion in *Hammer* vs. *Dagenhart*, 247 U. S. 251, 277.

Woodruff v. *Parham*, 8 Wallace (75 U. S.) 123, 138 is also authority for the statement that *Almy* v. *California*, 24 Howard (65 U. S.) 169, was not decided as a tax case under the taxing power but rather in reference to the power to regulate commerce, and came within *Crandall* v. *Nevada*, 6 Wallace (73 U. S.) 35.

It is submitted that in applying the power to make money exactions under the implied power inherent in the granted power to regulate commerce or protect the currency, or in applying the co-efficient power contained in the concluding part of the article, no undue restrictions are placed upon the taxing power. Nor will any such restrictions result if the implied power to make penalties contained in the constitutional grant of the Eighteenth Amendment is made use of instead of the power to tax under the taxing power. The words in the taxing power "to provide for the common defense and general welfare" is a statement of the objects for which money raised by taxation may be spent rather than a statement of the objects or purposes for which the power to tax may be used, irrespective of revenue. To regard the power of taxation as in its very nature limited to the purposes of revenue is not to deny or disguise the truth of Marshall's famous dictum in *M'Culloch* v. *Maryland*, 4 Wheat. 316, that "the power to tax is the power to destroy".

> "The two propositions are entirely compatible. This oft quoted maxim, instead of being regarded as a blanket authorization for the unrestrained use of the taxing power for any and all purposes irrespective of revenue, is more reasonably construed as an epigrammatic statement of the political and economic axiom that since the financial needs of a state or nation may outrun any human calculation, so the power to meet these needs by taxation must not be limited even though the taxes become burdensome and confiscatory." (See *"The National Police Power under the Taxing Clause of the Constitution", 4 Minn. Law Review, 247, at page 254*).

See also article by Professor Thomas R. Powell—*"Indirect Encroachment on the Federal Authority by the Taxing Powers of the States", Jan. 1918—31 Harvard Law Review, 321.*

The framers of the Constitution never intended that the taxing power should be used for other than revenue purposes, for they built the national government upon the principle of enumerated powers. They never intended that Congress under the guise of the power to lay taxes should exercise the police power. Otherwise there would have been stored up in that power a substantial fund of congressional authority far-reaching in its scope to deal wtih social and economic problems. (See article by Judge Charles M. —Hough, *"Covert Legislation and the Constitution"*—June, 1917—*30 Harvard Law Review 801.* Also article by Paul Fuller, *"Is There a National Police Power"*—1904—*4 Columbia Law Review 563.*) Had the framers intended that the taxing power could be used for police measures, they would have swept away by this one specific grant most of the other limitations upon the scope of federal authority.

> "Had the framers of the federal Constitution even so much as dreamed that the government to be established under it * * * would levy taxes to prevent the payment of taxes, the Constitution itself would never have been called into existence and the great American republic would never have had a history". (See Wells' *"Theory and Practice of Taxation"*, Chapter 11, page 267). See also article *"Tyranny in Taxation"* by Theodore Bacon in *"The New Englander", July 1867, Vol. XXVI, p. 442, at 457.*

The debate on the limitations of the taxing power has been further accentuated because of the difference of opin-

ion as between the exercise of the police power as distinguished from the taxing power. Cooley in his treatise on "*Taxation*" considers the difference to be one of substance and not of form, (See Cooley on *Taxation, Fourth Edition, Vol. 1, Section 27, Page 95,* and *Vol. 4, Section 1784, Page 3511*) while Professor E. R. A. Seligman in his "*Essays in Taxation*" believes that the whole distinction rests upon a confusion and upon legal expediency.

Professor Seligman, however, recognizes a further classification of money exaction as an exercise of the *penal power* as distinguished from any and all other powers including the taxing power which we have been analyzing. In his "*Essays in Taxation*", Revised, Chapter 14, page 401, he says—

> "In taking the property of individuals the sovereignty of the modern state manifests itself in different ways. The government may exercise in turn the power of eminent domain, *the penal power,* the police power or the taxing power. * * * (Italics ours.)
>
> "The second sovereign power of fiscal importance is the penal power, or right of inflicting fines and penalties, known technically as the power of sanction. This might be declared a part of the police, or regulative power of the state, since every government regulation must carry with it the power of enforcement. But on account of the decidedly problematic fiscal importance of the police power, it seems better to separate them. The power to adjudge fines and penalties, however, while often quite important as a source of revenue, belongs rather to penalogy and administration than to the science of finance; *for the private property is here taken,* not in accordance with the needs of the state or with any principles of equality or uniformity or benefits or compensation,

> but *solely as a punishment inflicted on an individual.* * * * Fines and penalties thus form by themselves a class of compulsory revenues levied according to definite or non-fiscal principles. It is obviously wrong to class them with fees as do some writers or to ignore them entirely as do others." (Italics ours.)

Mr. Justice Miller in his "*Lectures on the United States Constitution", page 235,* states the definition of a tax as given by practically all of the authorities when he says—

> "The definition by both Webster and Story is that a tax is a *contribution* imposed by government on individuals for the service of the state",

and Justice Isaacs in his dissenting opinion in *The King* v. *Barger,* 6 Commonwealth, L. R. 41 at page 99, correctly states that *a penalty is never spoken of as a contribution.*

The case of *The King* v. *Barger,* decided by the high court of Australia in 1908 was an action under an excise tariff of 1906 for a failure to comply with conditions specified in that act as to the remuneration of labor. It was urged against the act that it was not one for revenue, but in fact was a penalty, and therefore not within the taxing powers of the Commonwealth of Australia. (See 6 Commonwealth L. R. 41 and 44.) The action came before that court by demurrer to the claims of the government. The excise act provided certain duties with the proviso that it would not apply to goods manufactured under conditions as to remuneration of labor which were declared by resolution of both Houses of Parliament to be fair and reasonable, or which were in accordance with the terms of an agreement or award under the Commonwealth Conciliation Act of 1904. The question was stated as one whether this

was an act under the taxing powers of the Commonwealth or a penalty which attempted to exercise the police powers reserved to the states. Sir Samuel Griffiths, Chief Justice, and Justices Barton and O'Connor held that the excise act was void as an attempt to use penalties to regulate intrastate business, while Justices Isaacs and Higgins dissented on the ground that the statute on its face was an exercise of the taxing power and under the doctrine of *McCray* v. *United States*, 195 U. S. 27, the judiciary had no right to go behind the face of the act. Justice Isaacs, 6 Com. L. R. 41 at page 54, does however state—

> "The difference between a pecuniary penalty and a tax is that the former is a sum required in respect to an unlawful act, and the latter is a sum required in respect to a lawful act."

The decisions of the United States Supreme Court are closely analyzed in both majority and minority opinions of the high court of Australia. While that case was decided before the *Child Labor Tax Case*, 259 U. S. 20, nevertheless the same result was reached, with the exception that the majority opinion in the Australian case claimed for the judiciary the right to make an inquiry into the purpose of an act as distinguished from a search as to the motives of the legislature, and held that this amounted to nothing more than looking to the substance and not to the form of the act. From this point of view the majority opinion regarded the Australian act on its face as an unwarranted exercise of the taxing power. The court said (6 Commonwealth L. R. 41, at page 74):

> "Now, it is clearly within the competence of a State legislature to regulate conditions of labour em-

ployed in the manufacture of agricultural implements. It is equally clear that a State legislature, having prescribed such conditions, could impose a pecuniary burden upon everyone who did not conform to them, and that the payment might be made proportionate to the number of articles produced. Yet, if such payment were a duty of Excise, the State could not impose it, for the power of Parliament to impose duties of Excise is exclusive. Such an Act might be framed in several different ways. It might be prescribed that certain conditions as to remuneration of labour should be observed in the manufacture, and that any manufacturer who failed to comply should be liable to a penalty of so much for every article manufactured. Or, without formally prescribing any such condition, it might provide that any manufacturer who did not observe certain conditions should be liable to a penalty of so much per article. Or it might, instead of using the word penalty, say that the manufacturer who did not comply with certain conditions should be bound to pay a licence fee, the amount of which should be computed at so much for every article manufactured. Or it might provide that every manufacturer should at his option either comply with certain prescribed conditions or pay to the State Treasurer a sum computed etc., and in default should be liable to the penalty of etc. Or, finally, it might provide that any manufacturer who did not comply with certain specified conditions should pay a tax at a specified rate. In all the cases supposed the substance would be the same, though the form would differ. * * * In any of the cases supposed, the purpose of the Act, apparent on its face, whatever attempt might be made to disguise it in the Title, would be, not to raise money for the purposes of government, but to regulate the conditions of labor. From this point of view an inquiry

> into the purpose of an Act, is not an inquiry into the motives of the legislature, but into the substance of the legislation. And for the purpose of determining whether an attempted exercise of legislative power is warranted by the Constitution regard must be had to substance—to things, not to mere words."

And further, at pages 76 and 77, the court continues—

> "It is, however, suggested that, so regarded, the regulation is not in the nature of a law, since the concept of law imports that the legislature can and does visit its displeasure upon those who disobey its commands or fail to comply with its wishes. This visitation is called the 'sanction' of the law. If the mode in which the displeasure is visited is by imposition of a pecuniary liability, it cannot be material whether that liability is enforceable in one Court as a debt or in another court under the name of a penalty. The sanction is the same in substance, and equally effectual, in either case. If this were not so, the Commonwealth Parliament might assume and exercise complete control over every act of every person in the Commonwealth, by the simple method of imposing a pecuniary liability on everyone who did not conform to specified rules of action and calling that obligation a tax, not a penalty.

This court has come to recognize the classification of a money exaction as a penalty under the penal power or implied power as distinguished from a money exaction as a tax under the taxing power.

See—

Child Labor Tax Case—259 U. S. 20;
Regal Drug Co. v. *Wardell*—260 U. S. 386;
Lipke v. *Lederer*—259 U. S. 557;

Hill v. *Wallace*—259 U. S. 44;
Trusler v. *Crooks*—70 Law Ed. 198;
Helwig v. *United States*—188 U. S. 605;
O'Sullivan v. *Felix*—233 U. S. 318;
St. Louis Cotton Compress Co. v. *Arkansas*—260 U. S. 346.

Mr. Chief Justice Taft in the *Child Labor Tax Case*, 259 U. S. 20, said:

> "The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are immediate. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."

The Solicitor General in an effort to differentiate between a tax and a penalty in that case, admitted in his brief—

> "It may not be easy to draw a line of demarcation between a penalty and a tax, but the line of

demarcation seems to be that, *where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then it is a penalty, and not a tax at all;* but where the thing done is not prohibited, but, with respect to the privilege of doing it, an excise tax is imposed, it is none the less a tax, even though it may be, in its practical results, prohibitive. • • • Where the excise tax is prohibitive in amount, there may be little practical difference between an excise tax and a penal prohibition; but, theoretically, they are different exercises of governmental power". (Italics ours.)

The Child Labor Tax case distinguished *McCray* v. *U. S.*, 195 U. S. 27. The question there, it said, involved the excessiveness of the tax. The only redress as to this was an appeal to the legislature, for Congress might impose a tax burden as and where it would, and that the court would not inquire into the motives of Congress unless the tax measure clearly shows on its face that it is something other than a tax measure. To the same effect see *Hill* v. *Wallace*, 259 U. S. 44.

An understanding of the expression "on its face" might be more clearly had from a study of that expression by Chief Justice White when he used it as a Senator in the United States Senate rather than from the McCray case itself. There he said, that as a legislator he might know the purpose of an apparent revenue bill, and, therefore, it would be to him "subjectively unconstitutional", while if he passed upon the same bill as a judge he would have to look at it "objectively", regardless of the motives that entered into it to determine whether on its face it was a revenue measure. *(See Congressional Record, July 21,*

1892, Vol. 23, 6518-6519). See also statement of President Cleveland on his approval of the Oleomargarine Tax, 1886, Richardson's *"Messages and Papers of the President," Vol. 8, page 407.*

The latest decision of this court on this subject is *Trusler* v. *Crooks,* decided January 11, 1926, and appearing in 70 Law Ed. 198. The Future Trading Act imposing a tax on trade privilege or option for contract for grain, was held to be an imposition of a penalty under the guise of taxation and unconstitutional. The case followed the doctrine laid down in *Hill* v. *Wallace, supra,* and reached its conclusion after considering that the statute could not have been one for purposes of revenue.

In *Helwig* v. *United States,* 188 U. S. 605, where the words "further sum" were alleged to impose a duty because of a violation of the under appraisement of imported goods, the "further sum" so exacted was termed a penalty because it was exacted for the punishment of the violation of the under appraisement. The court in that case said—

> "Whether the statute defines it (a money exaction) in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character."

In *O'Sullivan* v. *Felix,* 233 U. S. 318, the question involved was whether a state statute of limitations against a suit for damages controlled or whether the federal statute of limitations for a penalty controlled. The action was for an assault upon a voter, committed in violation of a federal statute. This court held that the penalty provided was to be distinguished from the remedial provisions of the statute, in that a penalty was a punishment, while a

remedial provision was a redress in the form of damages for a private wrong. The court said—

> "The term 'penalty' involves the idea of punishment for an infraction of a law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer."

The only case which seemingly might be cited as authority for the proposition that a tax on a prohibited business was not a penalty was *Hodge* v. *Muscatine County*, 196 U. S. 276, decided by a divided court. The case involved the sections of an Iowa statute imposing a tax on the real property of the owner thereof where cigarettes were sold and for the sale of which cigarettes the guilty party was to be fined and imprisoned. The majority opinion of this court said—

> "It is not easy to draw an exact line of demarkation between a tax and a penalty, but in view of the fact that the statute denominates an assessment a 'tax', and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a crimnnal prosecution, we cannot go far afield in treating it as a tax rather than a penalty. * * *"

This court in that case felt constrained to follow what it thought to be the opinion of the highest court of Iowa, reported in 121 Iowa 482, that the money exaction was a tax and not a penalty, and said, 196 U. S. 276, at 279—

> "This being the latest expression of opinion of the Supreme Court of Iowa, we accept it for the purposes of this case."

It was not necessary, however, and it did not hold precisely that the money exaction was in the nature of a tax, because the only question presented to it was whether or not property was taken without due process of law. Under the provisions of the statute the landlord was given his right to his day in court, and it was therefore held that the money exaction, whether a tax or a penalty, was not taken without due process of law.

This same statute, which this court hesitated to designate either as a tax or a penalty, came again before the highest court of Iowa in *Taft* v. *Alber,* 185 Iowa 1069, to determine whether or not the act was unconstitutional as a taxing measure because it failed to conform with the state constitution in distinctly stating the tax and the object to which it was to be applied. The Supreme Court of Iowa held the measure constitutional because it was not a tax but rather was a penalty, and therefore did not need to conform to the specific requirements of the constitution. The Iowa court said (185 Iowa Reports 1069, at page 1071)—

> "It is claimed that the statute is an attempted exercise of the taxing power, and an attempt to impose a tax upon property and person for revenue; * * * A tax, in the broad sense, is for the purpose of raising revenue, and the revenue, when raised, is intended to meet the specific demands of the government. * * * It is through the taxing power that revenue is produced. * * * To impose a tax for no specific purpose is to provide revenue for no specific purpose. * * * Yet these general needs can be approximately determined, though the amount cannot be definitely known. So the levy of taxes for general purposes is sufficiently definite in scope and pur-

pose to limit the revenue collected by means of the tax to a specific and definite purpose.

* * * * * * *

"So it follows that, if this statute were enacted upon the general taxing power, and for the purpose of raising revenue for the support of the government, we would be compelled to hold with the appellant, and say that it does not come up to the requirements of the provision of the Constitution hereinbefore quoted. This, however, we cannot do. No doubt, the legislature, recognizing, or thinking that it recognized, an evil in the traffic in cigarettes, felt that the public good demanded that the restraining hand of law be placed upon the traffic. Thereupon, the legislature, in its seeming wisdom, enacted Section 5006 of the Code of 1897, through which it undertook to prohibit this sort of traffic, and provided a penalty for any violation of its inhibition. The thought of the legislature evidently was that the traffic in cigarettes was inimical to the public good, and ought to be suppressed. The traffic was made unlawful. This unlawful traffic was carried on in buildings not owned by the person carrying on the illegal traffic. The thought of the legislature seems, then, to have been that, as an additional deterrent to the unlawful business, a penalty ought to be exacted of any person who allowed his building to be used for the unlawful purpose; and so the penalty of $300 was imposed upon a person so permitting it to be unlawfully used, and upon the property permitted to be used. *This was in no sense a tax for revenue, though it may afford revenue. Its primary purpose was, not to secure revenue, but to aid in the enforcement of the inhibition found in Section 5006.* (Italics ours.)

And in *State ex rel Kern* v. *Emerson*, 90 Washington 565, the court considered the nature of the so-called "Red Light" statute and the "Mulct" liquor laws, as passed upon by the several state courts, and at page 572 says—

> "It will not be contended that an owner without notice is liable to pay the charge upon his property if it be a penalty. But it is said that the imposition is a tax which the owner must pay as a 'deterrent' * * *.
>
> "*A penalty cannot be converted into a tax by naming it a tax.* The character of the imposition depends upon the purpose and objects of the law, and its results as they affect persons and property. A tax is a thing general in its application, a charge upon persons or property or classes of property. * * * Whereas, *a penalty is a thing imposed by way of punishment for the violation of some statute.* * * * *Such a charge is always held to be a penalty when laid upon the innocent.* The distinction between a tax and a penalty has been drawn in many decisions. They are cited in Words and Phrases under the titles 'Tax' and 'Penalties'.
>
> "But to inquire whether such a charge, as is here imposed, is a tax or a penalty is a splitting of hairs, for the cigarette cases cited are not in conflict with our holding. * * *
>
> "If a man rents his home, he has done a thing that he has a lawful right to do. If his tenant puts the property to an unlawful use, the tenant is guilty, but the penalty of his wrong-doing cannot be put upon the landlord unless he knew of the intended use, or the facts and circumstances are such as to make him, constructively, a party to the crime.
>
> "*So that, assuming a penalty may be imposed upon one who is truly or constructively guilty of maintaining a nuisance, it does not follow that one*

> *who is not a party to it in any way can be charged. To do so would be to take the property of an unoffending citizen without due process of law.* * * *
>
> "The question is new and an open one in this state. We may reasonably expect that the law will be vigorously enforced and that the question discussed will frequently recur. For this reason, we have endeavored to reason it out along the lines of common sense and well established principles and as, we believe, the legislature intended. *Any other conclusion would put the penalty, not upon the prohibited business, but upon rightful and lawful ownership of property.* * * * (Italics ours.)

In the case of a money exaction in the nature of a penalty, there is no benefit either to the government or to the person from whom the exaction is made. It is not based upon the needs of the state or upon any of the principles of government taxation, but it is inflicted as a punishment against the offending individual upon non-fiscal principles. All of the authorities on public finance and economics are in accord in saying that there must be a state necessity for the money and it must be used for a public purpose in order to constitute a tax. Professor Seligman is authority for the statement that there must be a benefit—a common benefit in the case of a tax and a special benefit in the case of a fee, and Judge Cooley in his work *"Constitutional Limitations"*, 6th ed., at page 613, says—

> "When taxation takes money for the public use, the tax payer receives, or is supposed to receive, his just compensation in the protection which government affords * * *."

It would be preposterous to say that there is a common benefit to the public by the payment of a money exaction as a punishment for disobedience of the law; and certainly no one would claim that a criminal making the payment derived any special benefit. If accepted as a tax, it must be a tax on crime. This would be repugnant to the idea of securing revenue as an enforced contribution to good government.

In the *License Tax Cases* the money exaction was not made as a punishment. No federal law was violated. It was the state that had legislated against the lotteries and retail liquor sales, and in that case it was recognized that the tax could not have been levied in connection with a violation of a federal law, as a tax on crime is incompatible with revenue of a government of civilized people. No free government could afford to profit by the human frailities of its own citizens. The court in that case said, 5 Wall. 462, (72 U. S.), at page 469—

> "It is not necessary to decide whether or not Congress may, in any case, draw revenue by a law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature",

and Cooley in "*Constitutional Limitations*", 6th ed., page 598, says—

> "Everything that may be done in the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized

> will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principles of constitutional government."

It is not necessary to impute any intention to Congress to tax crime or to unlawfully confiscate property in the cases now before this court. Congress has respected the rights of its law abiding citizens. It has specifically provided for them in Section 26 of the National Prohibition Act. It never intended that this old statute (Section 3450 Revised Statutes) should be wrested out of its plain context and applied to innocent parties in utter disregard of their rights simply because the administrative branch of the government might find it more expedient in meeting a new delinquency. Congress has clearly shown its intention to penalize the prohibited business and not the lawful ownership of property of the innocent conditional vendors and mortgagees of automobiles. This may be seen by the language used in the tax acts, (diverted and diversion) and the machinery set up in the Prohibition Act for its enforcement.

II.

Additional authorities to Arguments 1 and 2 of our original brief.

As authority in addition to those cited in support of our Argument No. 1, on page 12 of our original brief, that Section 3450 was repealed and was not re-enacted by the Willis-Campbell Act, and that *United States* v. *Stafoff*, 260 U. S. 477, does not hold the contrary, we would like to add

the well reasoned decision of Judge Faris in *United States* v. *One Chevrolet*, 9 Fed. (2) 85, where he says at page 87 and page 88—

> "But I am forced to conclude that, on the state of facts here presented, there is an irreconcilable conflict between title 2, Section 26, and Section 3450, and that upon these facts title 2, Section 26, supra, applies, and Section 3450, supra, does not apply. * * *
>
> "It is true, that none of these cases considered the effect, if any, of the Willis-Campbell Act (42 Statutes 222) as construed by the Supreme Court in the case of United States *v.* Stafoff, 260 U. S. 477. But my own view is that the latter case in no wise affected the correctness of the rulings in the cases last above cited. I have not been able to find anything, either in the Willis-Campbell Act, or in the Stafoff case, which in any logical sense militates against the conclusions reached by the several Courts of Appeal, or against the views which I am constrained to take here. This is so, not only for the reasons I have tried to point out, but for those I lately announced in the case of Jasper *v.* Hellmich, 4 Fed. (2) 852."

Also, we would like to add as further authorities to our Argument No. 2, page 19, at page 23, etc., of our original brief, the decision of this court in *United States* v. *Katz*, 70 Law Ed. 554, and *United States* v. *Jin Fuey Moy*, 241 U. S. 394.

In our original brief we pointed out (page 23, etc.) that the tax was *in personam* against the *distiller*, and that a severe statute like Section 3450 could not be extended so as to include the mere *transporter* of the liquor. We believe the above authorities of this court will further support our

argument that the statute should be limited to those specifically named. Otherwise it leads to the absurd result of confiscating property of innocent parties, and from a consideration of all the legislation on the subject, it would be evident that the legislative purpose is satisfied by the limited interpretation in applying the statute to distillers only.

III.

Reply to government's brief in Port Gardner Investment case at original argument.

At the original argument there was served upon us by the government the day preceding the oral argument a brief in *Port Gardner Investment Company* v. *United States.* We did not have time to file a written reply to that brief. A subsequent examination of the brief, however, revealed the weakness of many of the authorities cited therein.

The reasoning of Judge Sibley in *United States* v. *One New Marmon Automobile,* 5 Fed. (2) 113, is quoted from at length on pages 31 to 34 inclusive of the government's brief. The decision of Judge Sibley in that case, however, has since been reversed. See—

> *Marmon Atlanta Company* v. *United States* (C. C. A. 5), 8 Fed. (2) 267.

The soundness of the decision of Judge McDowell in *United States* v. *Turner,* 266 Fed. 248, quoted from on page 22 of the government's brief, has been questioned in *Ketchum* v. *United States* (C. C. A. 8), 270 Fed. 416, at

page 420, and it is said to be in conflict with the Circuit Court in *Reed* v. *Thurmond* (C. C. A. 4), 269 Fed. 252, in which circuit the court over which Judge McDowell presides is located. Judge McDowell's decision was also criticised as not convincing in *United States* v. *Fredericks* (D. C. N. J.), 273 Fed. 188, at page 189; and in the *Yuginovich* case, 256 U. S. 450, at page 462, it was cited as being contrary to the final decision of this court in the *Yuginovich* case. It is interesting to note that Judge McDowell in the recent case of *Coffey* v. *Noel*, 11 Fed. (2), 399, now regards the taxes imposed by Section 600-a of the Revenue Act as in fact penalties.

The decision of Judge Lindley in *United States* v. *One Cadillac*, 292 Fed. 773, from which quotations are cited in the government brief at page 30, was criticized by Judge Hutchinson in *United States* v. *One Studebaker*, 298 Fed. 191, at page 193, as being unsound and he refused to follow it.

The brief filed by us at the original argument was really in reply to the government brief in *United States* v. *One Ford Coupe*, and in that brief the government had tried to make out a case that the tax of which it had been defrauded was that of $6.40 on beverage liquor. In our original brief we pointed out that this was due largely to confusion in the mind of counsel for the government as to the tax statutes, because of the maze of the effective dates in the various statutes cited (See our original brief, pages 36 to 41 inclusive, and pages 24 to 26). Apparently dropping this argument, then, upon the tax of $6.40 for beverage liquor, the government in its Port Gardner Investment Company brief subsequently filed, stresses its contention that the tax of which it had been defrauded was the basic tax of $2.20

for non-beverage liquor. In the Port Gardner Investment Company case, however, the driver of the automobile, Luther L. Neadeau, had been convicted of transporting beverage liquor. It seems to border on the fantastic to allege that the automobile driven by Neadeau was defrauding the government of a tax on non-beverage liquor, and at the same time convict Neadeau for transporting the same liquor as beverage liquor. This same argument was advanced by the government in practically all of the cases before the Circuit Courts but was not accepted, and most certainly was urged in the case of *Commercial Credit Company* v. *United States,* 5 Fed. (2) 1, where at page 5 the court said—

> "We do not see that this liquor can be thought of as possibly produced for non beverage purposes, and hence still subject to taxation on that theory. The system of producing non beverage spirits is surrounded by careful safeguards; the law in that respect is to be enforced by a specified punishment for disregarding these safeguards, not by inference drawn from any fiction that illicit liquor is to be considered, for convenient purposes, as if lawful."

In stressing such an argument, counsel for the government has failed to be guided by the principle announced by this court in *United States* v. *Katz,* 70 Law Ed. 554, at page 556, where it says—

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

Respectfully,

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Counsel.